



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 3, 1997

Mr. Paul M. Gonzalez  
Matthews and Branscomb  
106 South St. Mary's Street  
San Antonio, Texas 78205

OR97-2632

Dear Mr. Gonzalez:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 110576.

The City of Eagle Pass (the "city"), which you represent, received a request for "any and all information on the murder of . . . Marcus Joseph Kelly, Killed 11-22-96 in the Holly Apartments in Eagle Pass Texas." You assert that the information is excepted from disclosure pursuant to section 552.108 of the Government Code. We have considered your arguments and have reviewed the information submitted.

The protection of section 552.108 may be waived by the governmental body if it fails to timely seek a determination from this office as to the applicability of the section 552.108 exception to particular records. Section 552.301(a) provides as follows:

A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the exceptions under [Chapter 552] must ask for a decision from the attorney general about whether the information is within one of the exceptions. The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

Section 552.302 of the Government Code provides that information "is presumed to be public information" if a request for a decision from the office of the attorney general is not timely sought.

The city received the original request on August 9, 1997. You inform this office that the city received an identical request from this requestor on July 21, 1997, and on July 31, 1997, provided the requestor with a copy of the front page of the offense report and a detailed explanation of the basis for withholding the remainder of the investigative file. You advise us that the city withheld the file pursuant to section 552.108 and the Texas Supreme Court's decision in *Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996). You state that as the second request was essentially identical to the first, the city did not respond further and has complied with the Open Records Act.

On September 8, 1997, more than ten business days after receiving the request for information, you informed this office that you were in receipt of our letter notifying the city of a complaint received by this office from the requestor, and setting forth the facts with regard to the request. By letter dated September 18, 1997, you acknowledged this office's assigning of a file number to your correspondence of September 8<sup>th</sup>, but notified us that "[w]e do not believe an opinion of the Attorney General is necessary" in this matter because "the Supreme Court recently opined on this issue in (*Holmes*)."<sup>1</sup> You further stated that "[a] closed investigative file maintained by a law enforcement agency is excepted from disclosure under the plain reading of the exception." By letter dated September 22, 1997, you enclosed the investigative file with regard to this incident and again noted that the file had been withheld from the requestor pursuant to section 552.108. You further requested that we confirm that this information is not subject to disclosure under the Open Records Act.

The city is mistaken in its belief that since the Supreme Court has previously ruled on the application of the law enforcement exception to the police files, it is unnecessary to seek an opinion from this office for documents that are related to law enforcement or a criminal investigation. Whether information falls within section 552.108 must be determined on a case-by-case basis. Open Records Decision Nos. 434 (1986) at 2, 287 (1981) at 2. Because we have not made a prior determination with respect to the type of information at issue here, the city must seek a decision from this office if it asserts that the requested records are excepted from disclosure under section 552.108. See Gov't Code § 552.301(a).<sup>1</sup>

As a result of the city's failure to meet its ten-day deadline for requesting an opinion from this office, the requested records are presumed to be public information. Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). In order to overcome this presumption, the governmental body must show a compelling interest to withhold the information to overcome this presumption. See *Hancock*, 797 S.W.2d at 381. Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 (1977) at 2. You have not shown compelling reasons why the information should not be released. Consequently, the city may not withhold any of the requested information under section 552.108 of the Government Code.

---

<sup>1</sup>Please note that section 552.108 of the Government Code was amended by the 75th Texas legislature. See Act of June 1, 1997, H.B. 951, §1, 75<sup>th</sup> Leg., R.S.

We note, however, that The Seventy-fifth Legislature added section 552.130 to the Open Records Act which governs the release and use of information obtained from motor vehicle records. Section 552.130 provides in relevant part as follows:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]

See Act of May 29, 1997, S.B. 1069, § 4, 75<sup>th</sup> Leg., R.S. (to be codified at Gov't Code § 552.130). The information submitted contains a photocopy of a Texas drivers' license which must be withheld pursuant to section 552.130. The remainder of the responsive information must be released to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/ch

Ref.: ID# 110576

Enclosures: Submitted documents

cc: Ms. Brenda Hess  
5447 East 5<sup>th</sup> Street, Suite 116  
Tucson, Arizona 85711  
(w/o enclosures)